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NO. 88-1072

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF TENNESSEE,
HAWKINS COUNTY, TENNESSEE, et al.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AMICUS BRIEF FOR THE STATE OF SOUTH DAKOTA, ET AL., IN SUPPORT OF THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Can a state impose a tax on a private contractor's beneficial use of federal property and measure that tax by the value of the federal property, minus a deduction for any restricted use, in an effort to equalize taxation of federal contractors with that of owners and other users of property in the state, without violating the Supremacy Clause of the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI STATES	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING REVIEW	
THE DECISION OF THE SIXTH CIRCUIT, HOLDING THAT A STATE MAY NOT IMPOSE A TAX ON A PRIVATE CONTRACTOR'S BENEFICIAL USE OF A CONTRACT WITH THE FEDERAL GOVERNMENT, WHERE THE INTEREST IS MEASURED BY THE VALUE OF THE FEDERAL PROPERTY LESS ANY RESTRICTED USES, RAISES AN IMPORTANT QUESTION UNDER THE SUPPREMACY CLAUSE WHICH HAS YET TO BE, BUT SHOULD BE, SETTLED BY THIS COURT.	4
CONCLUSION	11
APPENDIX	App-1

TABLE OF AUTHORITIES

CASES CITED:	PAGE
United States v. City of Detroit, 355 U.S. 466 (1958)	5, 9
United States v. County of Fresno, 429 U.S. 452 (1977)	5
United States v. Hawkins County, Tenn., 859 F.2d 20 (6th Cir. 1988)	2
United States v. New Mexico, 455 U.S. 720 (1982)	5
STATE STATUTES:	
Tenn. Code Ann. § 67-5-203(c)	Passim

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The amici states[1] urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-titled proceeding on September 30,

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[1]This brief is filed on behalf of the states, and their attorneys general, listed in Appendix A.

1988, and reported at 859 F.2d 20 (6th Cir. 1988).

INTEREST OF AMICI STATES

The amici states have a significant interest in the outcome of this case. A number of the amici states[2] have statutes similar to Tenn. Code Ann. § 67-5-203(c) in that such statutes tax the beneficial interest of a private contractor in a contract or lease with the federal government to operate a federal facility. Federally owned facilities operated by private

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[2] In particular South Dakota: S.D. Codified Laws Ann. §§ 10-4-2; 10-4-2.1 and 10-4-23; Michigan: Mich. Comp. Laws Ann. § 211.81; Minnesota: Minn. Stat. Ann. § 272.01; Nevada: Nev. Rev. Stat. § 361.157; Colorado: Colo. Rev. Stat. § 39-3-112; Virginia: Va. Code Ann. § 58.1-3502; Utah: Utah Code Ann. § 59-4-101, have statutes imposing a tax on a private contractor's beneficial use of a contract or lease to operate otherwise exempt property, including federal property.

contractors exist in all of the amici states. Thus, the ability of amici states to impose such a tax upon the private contractors is clearly affected by the decision of the Sixth Circuit in this case.

Beyond the specific issue at hand, that of a private contractor's interest in a contract to operate a federal facility, the amici states are concerned about the Sixth Circuit's overly broad interpretation of the Supremacy Clause, which would prohibit the states from exercising their traditional functions, such as taxation. If the amici states and their local governments are to shoulder additional responsibilities that have heretofore been functions of the federal government, they must continue to be afforded traditional state taxing powers in order to meet these new responsibilities.

The amici states believe that they are in a unique position to assist this Court in

understanding why this case should be granted review. Obviously, the constitutionality of Tenn. Code Ann. § 67-5-203(c) is an important issue to the State of Tennessee. Moreover, when the decision of a circuit greatly impacts the manner in which every state in this union can exercise a traditional state power, as such taxation, serious consideration should be given to granting review.

STATEMENT OF THE CASE

The amici states adopt the statement of the case as presented by petitioners. See Petition for Writ of Certiorari for the State of Tennessee, et al., at 3-7.

REASONS FOR GRANTING REVIEW

THE DECISION OF THE SIXTH CIRCUIT, HOLDING THAT A STATE MAY NOT IMPOSE A TAX ON A PRIVATE CONTRACTOR'S BENEFICIAL USE OF A CONTRACT WITH THE FEDERAL GOVERNMENT, WHERE THE INTEREST IS MEASURED BY THE VALUE OF THE FEDERAL PROPERTY LESS ANY RESTRICTED USES, RAISES AN IMPORTANT QUESTION UNDER THE

SUPREMACY CLAUSE, WHICH HAS YET TO BE, BUT SHOULD BE, SETTLED BY THIS COURT.

There is no dispute that every state has the power to tax a private contractor's use of federal tax exempt property in connection with its commercial activities carried on in the state for profit. In the case of United States v. New Mexico, 455 U.S. 720, 733-35 (1982), this Court held that where a private contractor operates a federal facility and has a "beneficial use" in that contract, there is a separate taxable interest in the private contract. Taxing this interest does not impose a tax upon the federal government. See United States v. City of Detroit, 355 U.S. 466, 470 (1958) (tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been commonplace in this country); United States v. County of Fresno, 429 U.S. 452, 462-63, n.10 (1977) (county had the power to tax an

individual's leasehold interest in the Forest Service's houses without violating the Supremacy Clause). Thus, it can be said with some assurance that there is no violation of the Supremacy Clause where a state imposes a tax upon the beneficial use that a private contractor has in a contract to operate a federal facility.

The dispute in this case arises because of the methodology used by the State of Tennessee in computing the "beneficial use" tax. Tenn. Code Ann. § 67-5-203(c) provides that all property of the United States leased or otherwise used for other than an exclusive public purpose by any person, not an agent or instrumentality of the United States, will be assessed to the user of such property at its value subject to a deduction for any restricted use. The Sixth Circuit struck down the Tennessee statute as an attempt to do indirectly what the State cannot do

directly, i.e., impose an ad valorem property tax on the federal government. the Sixth Circuit reasoned that since the method of valuation of the beneficial use for the private contractor included in the formula the value of the federal property, such a tax was essentially an ad valorem property tax on the federal government.

Such a line of reasoning would severely restrict, if not totally emasculate, the amici states' ability to impose a tax on private contractors, which this Court has previously sanctioned in the New Mexico case. It would be impossible, or extremely difficult, for a state to measure the "beneficial use" that a private contractor has in a contract to operate a federal

facility without considering the value of the facility as one of the factors.[3]

Private contractors operate federal facilities throughout this country. The amici states are unaware of the total number of private contractors who operate federal facilities or even the total number of states in which such facilities are operated. The amici statutes would venture to assert, however, that there may be a federal facility operated by a private contractor in every state in this country. This renders the question raised one of national, not just state or regional, significance.

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[3]Although the formula for determining the private contractor's beneficial interest is not worded in the same manner in each of the amici states' statutes, the value of the underlying federal property is a factor considered in all of the statutes. Thus, the decision of the Sixth Circuit would nullify those statutes if applied to them.

The amici states are attempting to impose a tax on the "beneficial use" to the private contractors of contracts to operate federal facilities. The fact that the private contractor may pass along this increased tax burden to the federal government does not mean that there is a Supremacy Clause violation, so long as the federal government is treated the same as others similarly situated. United States v. City of Detroit, 355 U.S. at 473-474. The Sixth Circuit, in its opinion, did not find or hold that Tenn. Code Ann. § 67-5-203(c) discriminated against private contractors operating federal facilities versus private contractors similarly situated who do not operate federal facilities.

Such a broad reading of the Supremacy Clause concerns the amici states. With state responsibility over areas once under federal control increasing in the past several years,

the budgets of state and local governments have become very tight. Therefore, state and local governments must look to all possible sources of revenue, including those of private enterprises that do business with the federal government, in order to meet these new responsibilities.

The question presented for review in this case undoubtedly goes to the heart of an important federal issue, which has not yet been, but should be, decided by this Court. How broad should the Supremacy Clause be where a state attempts to tax a private contractor's interest in a contract to operate a federal facility? An overly broad interpretation would immunize private enterprises doing business with the federal government, thereby removing what could be for some state and local governments a significant revenue source. The amici states contend that the Supremacy Clause was never

intended to prohibit the states from imposing such a tax.

CONCLUSION

The amici states believe that the issue presented in this case is of national importance, in that it concerns the ability of all states to tax private federal contractors equally with others. This Court has previously permitted non-discriminatory taxation of these contractors. Accordingly, the amici states urge this Court to grant the petition for writ of certiorari.

Dated this 24th day of February, 1989.

Respectfully submitted,

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